

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

76-2073

In The
UNITED STATES COURT OF APPEALS
For the Second Circuit

Docket No. 76-2073
(76-2085)

MILTON SILVERMAN,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

On Appeal from Orders of the United States District
Court for the Southern District of New York Palmieri,
J., Denying a 28 U.S.C. Sec. 2255 Petition to Set Aside
Petitioner's Prior Conviction in that Court and Denying
a Motion (F.R.Civ. P., Rule 60(b)) to Correct and Set
Aside that Order

APPELLANT'S REPLY



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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MILTON SILVERMAN,

Petitioner-Appellant,

-against-

Docket No. 76-2073
(76-2085)

UNITED STATES OF AMERICA,

Respondent-Appellee.

- - - - - x

APPELLANT'S REPLY

This reply is respectfully submitted on behalf of petitioner-appellant to correct essential misstatements of fact and law in appellee's brief. As corrected, they indicate that the relief requested by petitioner in the main brief and below should in all respects be granted.

POINT I

ESSENTIAL TRIAL TESTIMONY OF
PROSECUTORIAL WITNESS FRIEDLAND
WAS SHOWN TO HAVE BEEN PERJURED
WITHIN THE KNOWLEDGE OF THE PROSECUTION

Appellee argues that petitioner has failed to show Friedland, the ultimate prosecution witness at trial, had perjured himself (although no hearing was granted), that assuming the perjury was shown the prosecutor has not been shown to have instigated it (although he allowed it to stand) and that even if knowing use of perjury was made by

the prosecution, its correction has not been shown to have been likely to alter the result (although the prosecution granted Friedland immunity to secure his testimony).

(Appellee's Brief, pp. 9 - 16.)

On June 19, 1968, Jacob Friedland testified before Judge Murphy in a proceeding to quash a grand jury subpoena which would have required him to produce his then confidential report of his examination of the books and records of Local 810, including the December 1965 Executive Board minutes before they were altered (A.58-68*). His examination of the minutes and other records took place in February and March, 1967, while there was then outstanding a subpoena by the grand jury which returned the indictment against petitioner for their production (A.65) and which were produced a few months later. It must have been some time during the period between Friedland's preparation of his report in March, 1967, which states that the December 1965 minutes contained no authorization of Silverman's loan and Christmas expenditures and the production of the December, 1965, minutes before the grand jury in the form they remained at trial, authorizing that loan and these expenditures, that the minutes were changed. It was clear at the hearing before Judge Murphy, less than a year before

* References in the form "A. ____" are to the pagination of the volume of the appendix on the original appeal to this Court from petitioner's conviction (Docket No. 33584) titled "Exhibits and Related Documents."

petitioner's trial and only a year after the minutes were altered that Friedland's report was being specifically sought for the light it would shed on the alteration of the Local 810 records and any role Friedland himself might have played in such alteration (A.65-67). There was simply no lapse of time nor plausible circumstance for Friedland's recollection of these events to disappear - except his motive to conceal his own wrongdoing. The district court's unsupported finding to the contrary and appellee's attempt to defend it before this Court does not pass muster.

Friedland's testimony before Judge Murphy also disposes of appellee's contention that "Friedland was not asked who altered the books, nor did he testify that he did not know who altered them" and that defense counsel was free at the trial "to inquire on cross-examination about Friedland's possible participation in the alteration of the minutes" (Appellee's Brief, p. 12). Three times Friedland was asked by Mr. Maloney, who was also the Assistant United States Attorney who conducted the prosecution at petitioner's trial and by Judge Murphy if he caused or knew of any change in the union records as a result of his report (A.65-7). Three times he denied not recollection but participation or knowledge (Ibid.). The following testimony was given:

"Q (by Mr. Maloney) As a result of your report or your examination of the records of Local 810 did

you, directly or indirectly, cause any of the subpoenaed records to be changed?

A (by Jacob Friedland) No, sir." (A. 65)

Q Do you have any knowledge, directly or indirectly, as a result of your examination whether any of the records brought down here were changed?

A No." (A. 66-67)

"BY THE COURT:

Q Do you have any such knowledge of any changes or alterations?

A I have no knowledge." (A. 67)

It would be most foolhardy defense counsel, forewarned of this expected testimony by Friedland who would have elicited any such responses at petitioner's trial. As defense counsel was handicapped by the prosecutor's refusal to disclose his knowledge of Friedland's direct and indirect involvement in the alteration of the minutes contained in his memorandum requesting immunity and otherwise, petitioner was denied due process by that same prosecutor allowing Friedland's perjured denial of knowledge of his own procuring of the change of the minutes to go uncorrected. Under these circumstances the prosecution will not be heard to argue that disclosure of the perjury would have produced no different result. Napue v. People 360 U.S. 264, 269 (1959); United States v. Polisi, 416 F.2d 573, 577 (2d Cir. 1969); Kyle v. United States, 297

F.2d 507, 513 (2d Cir. 1961). That the Maloney memorandum if disclosed to defense counsel as it should have been would have triggered an inquiry that would have brought about an entirely different cross-examination of Friedland at the trial and would have allowed petitioner to further demonstrate knowing prosecutorial use of perjured testimony at the hearing improperly denied below is shown by the district Court's own opinion: "The Maloney memorandum indicates that the prosecutor surmised that Friedland's claim of his fifth amendment privilege was based on some involvement in the alteration of the union's books" (Opinion of Palmieri, J. 7/16/76, 161). But the court below then stated, "This would not support a finding that the prosecution knew what that involvement was." (Ibid.) But such nicety is not required. It was enough that the prosecutor knew of Friedland's involvement in the change - not its precise nature - which required disclosure to defense counsel to give the lie to Friedland's testimony that he had no recollection of any changes made. The extent of the prosecutor's knowledge if there were any doubt of it was a subject for inquiry at a hearing on this showing not summary rejection. It is to be hoped that the United States Attorney's office does not seek and the Attorney General's office does not grant immunity on mere speculative and baseless surmisals.

What appellee's argument on the nature of Friedland's testimony at trial boils down to is the assertion that it could not

have been perjury because it was a mere denial of recollection of any change in the December, 1965 union Executive Board minutes, not a denial that Friedland himself had directed and participated in such a change. (Appellee's brief, p. 11). The Court below appears to have so held (123-4, 161-2). But this is not the federal law of perjury. In Nicoletti v. United States, 310 F.2d 359 (7th Cir. 1962) (cert. den. 372 U.S. 942), the Court of Appeals upheld a perjury conviction of a defendant whose testimony was that he did not recall making certain statements a year and a half prior to his testimony. That perjury was proven in exactly the same manner as petitioner's proffer did below, namely the testimony of two witnesses as to statements and acts of the perjurer. Such circumstantial testimony is the only way false testimony of loss of recollection can be shown, for there both elements of perjury, falsity of the testimony and the witnesses knowledge thereof "relate to or involve the defendant's state of mind. . ." 310 F.2d at 363. Nicoletti relied upon this Court's decision in United States v. Collins, 272 F.2d 650, 652 (2d Cir. 1959), and Nicoletti was in turn cited with approval by this Court in United States v. Bergman, 354 F.2d 931, 934 (2d Cir. 1966): "To prove falsity, that he did recall, could not be done, absent an admission, by other than circumstantial evidence. Such evidence was held sufficient." 354 F.2d at 934.

Appellee makes another argument based on a statement in the opinion of the court below that the jury's verdict would not have been altered even if Jacob Friedland's testimony were taken to be perjurious as petitioner had shown: there would have been a "compelling inference that Friedland's alteration of the books was undertaken at Silverman's direction." (Appellee's brief, p. 26). That inference is not even plausible let alone compelling and, without any evidence whatsoever, has no place in a criminal case. Certainly Friedland was retained by Local 810, I.B.T., of which petitioner was at the time president, to examine the union's records after the grand jury subpoena for them had been served. According to the affidavit submitted below of Sophie Oschak, then Recording Secretary of the Local 810 Executive Board, Friedland asked her if the Executive Board had in fact adopted resolution at its December, 1965 meeting approving the loan and reimbursement of Christmas gratuities to petitioner and she said it had (25,26-7). Thereafter, Friedland directed her to change the Board's minutes to reflect that fact, supplying her with the language to be used (27). Max Sanchez, vice president of Local 810, (44), whose affidavit was also submitted below, was present during those events, confirms them, and also states that "Mr. Friedland said that he thought the minutes of the meeting (as originally drawn) did not clearly show such approval" by the Executive Board (45).

Herman Brickman, whose affidavit was also submitted below, an independent arbitrator with no affiliation to the union who was there to meet Friedland on another matter (48-9), confirms the event related by Oschak and Sanchez, and adds significantly, "As I knew from my long experience with labor affairs that such changes were often made, since the union people who take minutes at such meetings are rarely parliamentarians, I told Mrs. Oschak and Mr. Sanchez that it was proper to make such changes in minutes to fully reflect what decisions had been made at a meeting." (49). Thus we have quite a different picture grounded on evidence, not speculation and baseless inference, of a conscientious attorney, Friedland, acting on his own to ensure that the union records accurately reflected what action had been taken, acting not out of loyalty to an individual, petitioner or anyone else, but out of principle and, with knowledge of the outstanding grand jury subpoena, out of concern that only accurate submissions be made in response. That he later became concerned over his own possible involvement in threatened criminal charges the following year, when he himself was subpoenaed, by the Assistant United States Attorney's statements that he himself was a target, should testify first to his noninvolvement (on the proceedings to quash that subpoena before Judge Murphy, quoted supra) and then to his lack of recollection (at the trial) is understandable, if not laudable,

logical and, indeed, compelling.

But appellee's argument is based on a further false premise that is repeated throughout his brief sometimes as a direct assertion, sometimes subtly - that since petitioner must have known of Friedland's change of the minutes he is culpable for having caused it or abetted it (surely a non-sequitur) or should be denied relief since it was an issue that could have been raised at trial (which ignores the prosecutor's duty not to let perjured testimony stand). (Appellee's brief, pp. 10 n. 11, 12, 14n., 15, 15n**, 26). But the uncontroverted showing made by petitioner below was Sophie Oschak's sworn statement that petitioner was not present when the minutes were changed and knew nothing of it (27) which was again confirmed by the affidavit of Max Sanchez (47). Concerning Jacob Friedland's role in the change of the minutes, what petitioner "must" have known at the trial was that Friedland testified in the quashal proceedings before Judge Murphy, quoted supra, denied having anything to do with changing the minutes or even knowing that there was any change (A.65-7). That matter of record hardly put him on further inquiry.

Even more astonishing is the assertion that since Oschak and Sanchez were present in the courthouse at the trial (that they were under government subpoena and sequestered but not called is unmentioned), they "clearly could have and should have been

interviewed by defense counsel." (Appellee's brief, p.10n.) This is an unfortunate slander directed at appellee's own office for it assumes that a defendant in a criminal case must assume that a witness called by the prosecution has committed perjury and immediately rush out to interview anyone who conceivably might have been aware of it. But again this argument is contrary to the record on this proceeding. Mrs. Oschak's affidavit clearly states that she did not speak to petitioner about the change of the minutes because she had been repeatedly subpoenaed before grand juries, told she was a target, not granted immunity and advised by counsel not to talk with petitioner or anyone else involved in the investigation of the union (27-30). Mr. Sanchez's affidavit shows that he was under a similar disability. (46).

Yet appellee argues, when the prosecutor stated in response to the trial court's inquiry that he "had some evidence 'linking' Friedland with the books' alteration" (Appellee's brief, p.14), no request was made for the suppressed evidence (Id. at 15). The prosecutor had stated, however, in the proceedings before Judge Murphy what his position on Friedland's involvement appeared to be - that Friedland's report of his examination of the union records was for the purpose of affording the opportunity to commit a fraud, the alteration of those records (A.47). That was what Judge Murphy understood that position to be as

his opinions show (A.76,79). That must have been also the understanding of petitioner's attorneys. It was certainly fortified by the trial judge's statement at the very colloquy to which appellee refers: "This link in and of itself is not incriminating. Nobody could possibly persuade me that it is incriminating, and I am sure that Mr. Friedland's testimony would not in and of itself be incriminating" (Appellee's brief, p.14n.). (A statement by the judge below which may very well have foredoomed the present petition.) We now know otherwise through the facts presented in support of the petition in this proceeding.

The whole argument of appellee on Friedland's testimony passes over essential factor - neither in response to the petition below nor in this Court has the government taken any position as to what the prosecutor's undisclosed knowledge of Friedland's involvement in the change of the minutes was. The only factual response to the petition, which showed specifically and factually the nature of the Friedland perjury, its impact on the trial, and that the prosecutor had knowingly allowed it to go uncorrected and failed to inform the defense, was a two and one-half page affidavit of then Assistant United States Attorney Andrew Maloney, who prosecuted the case against petitioner (90-2). That affidavit responds to none of the specifics in the petition. The prosecutor does not deny that

Friedland committed perjury, he does not deny that he knew it was perjured when given and allowed it to stand, he does not deny that he knew what Friedland's involvement in the change of the minutes was, nor does he deny that his tactics in the repeated use of grand jury and other process on Oschak and Sanchez, threatening them with prosecution and withholding from them immunity effectively suppressed them as witnesses. This is a truly extraordinary response in a proceeding of this nature. It cannot be that he had no knowledge of Friedland's involvement in the alteration of the minutes because the court below concluded on reading that very prosecutor's memorandum in support of the request for immunity (not disclosed to petitioner at trial, or below), "The Maloney memorandum surmised that Friedland's claim of his fifth amendment privilege was based on some involvement in the alteration of the union's books." (161). It is not surprising that appellee's brief only makes scant reference to the existence of the Maloney affidavit in opposition at page 7n.** and thereafter does not refer to it again.

That such a response to a petition and showing in not a sufficient basis for denying relief let alone even a hearing is shown by the very cases relied upon by appellee. In McBride v. United States, 446 F.2d 229 (10Cir. 1971), cited in appellee's brief, p. 11, the government denied knowledge of perjury by its

witness and submitted affidavits of the prosecutor and an F.B.I. agent to that effect. 446 F.2d at 231. In United States v. Franzese, 525 F.2d 27(2d Cir. 1975), cited in appellee's brief at pp. 11, 17, 18, 26, 27, the government not only denied that there had been any perjury but submitted an affidavit of the Assistant United States Attorney in charge of the case which gave a factual refutation of the witness's statement and submitted F.B.I. reports on interviews of witnesses. 525 F.2d at 30. Moreover, at the bankrobbery trial of Franzese and his co-defendants, the government had disclosed the possible involvement of its witness then and previously in bankrobberies and disclosed the existence of an F.B.I. agent's affidavit, including an informer as to them. 525 F.2d at 32. Even on that prosecutorial showing this Court stated that on the district court's denial of a hearing, the "question may have been close". Ibid. Again in Dalli v. United States, 491 F.2d 758 (2d Cir. 1974), cited in appellee's brief at pp. 17, 18, an affidavit of a state agent denied each allegation of the affidavit in support of that 2255 petition. 491 F.2d at 762. This Court stated in Dalli, "As a recent pronouncement indicates, this court takes a dim view of summary rejection of a petition for post-conviction relief when supported by a sufficient affidavit." 491 F.2d at 760. The recent pronouncement referred to was in Taylor v. United

States, 487 F.2d 307(2d Cir. 1973), where this Court remanded for a hearing a 2255 proceeding in which the prosecution had submitted two affidavits sharply conflicting with the affidavits in support of the petition claiming knowing use of perjured testimony "with instructions that the petition be assigned to another judge." 487 F.2d at 308.

POINT II

THE CHLYSTUN PERJURY
AND SUPPRESSION

Unfortunately, appellee's treatment of the prosecution's use of the perjured Chlystun testimony and suppression of evidence concerning it reflects the same disregard of petitioner's right to due process here as below and at the trial. (Appellee's brief, pp. 16-18).

At the outset it should be observed that all of appellee's argument on this issue ignores the fact that all of the allegations and supporting affidavits and documents of the petition stand admitted on the record before this Court. The sole response to the petition below, the affidavit of the prosecutor, does not make even a passing reference to Chlystun, his testimony, Count 14 of the indictment or the infection of all the other counts on which conviction was had by what was improperly put before the jury on that count. (90-2). It simply was not even mentioned. As was pointed out to the Court below in a reply affidavit by petitioner's counsel (112-113), the prosecutor admitted sub silentio that in respect to the Chlystun testimony on Count 14 that he had left in petitioner's office the \$1000 in cash proceeds of a junked air conditioner allegedly belonging to the Welfare Fund, the testimony was false and the prosecutor was in a position to determine it was, the air

conditioners were not the property of the Welfare Fund and neither were the proceeds, the prosecution failed to make proper investigation (an understatement) and failed to provide exculpatory material to the defense.

Secondly, the suppression of evidence at the trial continued in the proceedings below. At page 18 of appellee's brief it is stated, "Equally without substance are Silverman's allegations that the Government failed to turn over material relating to possible impeachment of Chlystun.

Silverman's claim 'upon information and belief' (App. 114) that the Government's files house information that indicates Chlystun's desire to secure a conviction of Silverman in no more than an unsubstantial and frivolous allegation . . .

(a) bold faced allegation . . . no more than imaginary fancy. . ."

The "App. 114" reference is to petitioner's reply affidavit.

"(On information and belief, there are statements of Chlystun in the government's files, not disclosed to the defense at trial, which show in great detail Chlystun's eagerness to see petitioner convicted and Chlystun's attempts to link the alleged \$1,000 payment of Count 14 first to one item, then to another)." The information referred to was contained in the partial files which were produced for petitioner's counsel by the United States Attorney's Office (179, 181-3) and the belief was a hope that they had been preserved and that they

and the unproduced remainder would be brought before the court below before determination of the petition (182) which was not done. Not only did the files reflect Chlystun's attempts to fabricate a story concerning the air conditioners, it showed government agents laying the groundwork for an attempt to force persons other than Chlystun to attribute some sort of proceeds to petitioner from quite different salvage. Naturally, because the prosecution failed to produce these and other essential materials in response to a request it had agreed to, subpoena or motion, they are not directly a part of the record in this case. This should not mean that appellee should be advantaged by its own failure, that it should be free to make arguments and assertions contrary to information in its own files.*

Of similar purport is the argument that any such evidence would only be cumulative impeachment since Chlystun's hostility to petitioner was explored at the trial (Appellee's brief, p. 18n.*). Hostility is one thing, suppression of evidence by the prosecution that would have shown Chlystun eager to do

*So too, it was a denial of due process for the trial court to have reached a determination without even examining this material or a hearing as it did on the earlier Rule 33 motion showing new evidence that petitioner was not in his office the day the \$1,000 was allegedly left for him by Chlystun. See United States v. Silverman, 430 F.2d 106, 119 (2d Cir. 1970).

anything to bring about petitioner's conviction and fabrication of testimony is quite another, more devastating matter. The cases cited by appellee on this point are curious. In United States v. Rosner, 516 F.2d 269 (2d Cir. 1975), denial of relief in a Rule 33 proceeding on which a hearing had been held, this Court stated that a different result would be appropriate where the suppressed or undisclosed material related perjury and information vitally concerning motive of a prosecution witness. 516 F.2d at 273. United States v. Pacelli, 521 F.2d 135 (2d Cir. 1975), strongly points up the errors committed in the instant case for on a prior appeal, 491 F.2d at 1118, "this court reversed the prior conviction because the Government had failed to disclose a letter from Lipsky to the United States Attorney's office in which he indicated a willingness to testify against Pacelli." 521 F.2d at 139n.1.

The quotation from this Court's prior decision at page 17 of appellee's brief is inapt since it was directed to petitioner's newly discovered evidence - "alibi" motion under Rule 33 of the Federal Rules of Criminal Procedure under which there are quite different and more stringent requirements of the movant, while as here "an exception to the general rule given above may exist where the prosecutor has suppressed evidence." United States v. Silverman, 430 F.2d at 120.

Contrary to the tenor of appellee's argument, it is required to turn over material in its possession in support of 2255 petitions. See United States v. Keogh, 391 F.2d 138, 149 (2d Cir. 1968). A prosecutor's affidavit - particularly one that, as here, does not even touch on the issues raised - may not be considered a substitute for files and records essential to a determination of perjured testimony issues. See Taylor v. United States, 48 F.2d at 308.

POINT III

PETITIONER WAS DENIED DUE PROCESS IN THE PROCEEDINGS BELOW

What seems to have been lost sight of below was that petitioner was as entitled to due process as he was at his original trial. Walker v. Johnston, 312 U.S. 275, 286; 61 S.Ct. 574, 579 (1941). This he did not receive.

Appellee argues at pp. 25-7 of its brief that no hearing was required on the petition since petitioner failed to make a sufficient showing and at pages 22-4 that petitioner was not entitled to discovery and production of material in the sole possession of the prosecution in support of the petition since the court below had otherwise disposed of the petition without seeing the material not produced nor hearing the witnesses since there was no hearing. Such a facile sweeping aside such issues as knowing prosecutorial use of perjured testimony and other deprivations of constitutional rights is not permitted. See Taylor v. United States, supra, Sanders v. United States, 373 U.S. 1, 20, 83 S.Ct. 1068, 1079 (1963), and United States v. Agurs, 427 U.S. 97, 103-4 (1976). Even where the evidence was not willfully suppressed by the prosecution, as was the case in Agurs, the nature of the evidence must be examined by the district

court to determine its materiality and its probable affect on the result of the case. United States v. Agurs, 427 U.S. at 110-11. The district court cannot perform that function if it refuses to require production of the evidence or hear the witnesses. In United States v. Stofsky, 527 F.2d 237 (2d Cir. 1975), cited at page 26 of appellee's brief, the district court had that evidence before it. United States v. Franzese, supra, also cited at page 26, has been discussed, supra. Romano v. United States, 516 F.2d 668 (2d Cir. 1975), also cited at page 26, involved merely a claim that a witness had testified to four minor inconsistencies at a prior trial, the transcript of which was available to defense counsel. 516 F.2d at 771. Finally in United States v. Slutsky, 514 F.2d 1222(2d Cir. 1975), the evidence alleged to be newly discovered was of the individual's own corporate accounts, which of course the prosecution did not possess, control or suppress. 514 F.2d at 1225.

Appellee's brief, p. 24, would make it appear that the material subpoenaed by the defendant had been produced by the prosecution. An examination of the subpoena duces tecum served by petitioner's counsel on respondent (138A) refutes that claim for all that was turned over, and that in camera, were the Maloney immunity memoranda, a procedure strenuously protested below (173-5).

Appellee's brief, p. 26, would also make it appear that the court below accepted the showing the petition and the proffered witnesses were able to make as a basis for its ruling. But this was not so for the Oschak and Sanchez affidavits clearly and in detail set forth the reason why they were not previously available (27-9, 46) which was passed over below, although not denied by the prosecutor, and appellee passes over here. Once ignored, appellee feels free to argue that these unheard witnesses were at all times available to petitioner (Appellee's brief, pp. 26-7).

Appellee states that the prosecution approved Silverman's request for discovery (Appellee's brief, p. 33). Yet prior to the decision in its favor, the prosecution acknowledged that it had agreed to discovery (179, 181-3) and directed that a further search had been directed (183). These statements were in better form with copies to the court below. (Ibid.). The district court's second opinion herein states that the court was aware of petitioner's outstanding subpoena long before it rendered its original opinion and order denying the relief requested in the petition (157), but proceeded to decision without the benefit of the material encompassed therein or that the prosecutor's office had agreed to produce.

This procedure amply demonstrates that the decision appealed from should be reversed on the denial of due process and, it is respectfully submitted, the case remanded for assignment to another judge. See Taylor v. United States, supra, and Point III of petitioner's main brief.

C O N C L U S I O N

FOR THE FOREGOING REASONS AND THOSE SET FORTH
IN APPELLANT'S MAIN BRIEF, THE DECISIONS BELOW
SHOULD BE REVERSED, THE PETITION GRANTED AND
THE CONVICTION VACATED OR A HEARING HELD BEFORE
A NEW JUDGE AFTER FULL DISCOVERY, PRODUCTION
AND INSPECTION.

Respectfully submitted,

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